97-1408

Supreme Court, U.S.
FILED
APR 20 1998
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

97-1408

NUMBER ~~97-7810~~

RICARDO GONZALEZ,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

COMES NOW the Respondent Ricardo Gonzalez, pursuant to Rule 39 of the Rules of the Supreme Court of the United States, and respectfully moves for leave to file the accompanying Brief in Opposition to the State of Florida's Petition for Writ of Certiorari in the Supreme Court of the United States without payment of costs, and to proceed in forma pauperis.

Attached is a photocopy of Respondent's affidavit filed in support of his motion to proceed *in forma pauperis* in his petition for writ of certiorari filed under Supreme Court

13 pp

case number 97-7810. The original of this document is on file in that case.

Respectfully submitted,

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BY: William M Norris

WILLIAM M. NORRIS, ESQ.
Fla. Bar No. 309990

Supreme Court, U.S.
FILED
JAN 20 1998

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, RICARDO GONZALEZ, am the petitioner in the above-entitled case. In support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes ___ No X

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of salary or wages per month which you received. I DON'T REALLY REMEMBER-(PRESENTLY INCARCERATED.)

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? Yes ___ No X

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or have a checking or savings account? Yes ___ No X

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing) Yes ___ No X

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. O/ NONE

I declare under penalty of perjury that the foregoing is true and correct.
Executed on: JANUARY 26, 1998.

RICARDO GONZALEZ
(Signature)

CASE NO. 97-1408 ~~97-7810~~

IN THE UNITED STATES SUPREME COURT

October 1997, Term

STATE OF FLORIDA,

Petitioner,

vs.

RICARDO GONZALEZ,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

(Capital Case)

Whether the Florida Supreme Court erred in determining that the admission of a non-testifying codefendant's statement violates the confrontation clause because the exception to the hearsay rule for such statements is not sufficiently "firmly rooted" to qualify as a hearsay exception under the Florida Rules of Evidence?

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Gonzalez v. State, 700 So.2d 1217 (Fla. 1997).

JURISDICTION

As Petitioner notes in his Petition for Writ of Certiorari, his petition was not filed in a timely manner. Since the relief sought by Petitioner is the reinstatement of Respondent's sentence of death by electrocution, counsel for Respondent cannot overlook the untimely filing of the petition and requests that the petition be denied as untimely.

STATEMENT OF THE CASE AND FACTS

Petitioner's statement of the case and facts contained in his Petition for Writ of Certiorari tracked the opinion of the Florida Supreme Court for which review is sought. The Appellant's statements of the facts accurately reflect the facts of this case.

REASONS FOR DENYING THE WRIT

A. THIS COURT HAS CONSIDERED THE ISSUES RAISED BY THE STATE OF FLORIDA'S PETITION IN PRIOR CASES AND DECLINED TO GRANT A WRIT OF CERTIORARI.

In *Franqui v. State*, 699 So.2d 1312 (Fla. 1997), ("*Franqui I*"), the Florida Supreme Court announced the rule that was applied in this case. The State of Florida sought a writ of certiorari in that case *see Florida v. Franqui(I)*, number 97-1202. The Florida Supreme Court followed *Franqui I* in *Franqui v. State*, 699 So.2d 1332 (Fla. 1997) ("*Franqui II*"). This case involved the same crime for which the State seeks writ of certiorari as to Respondent Gonzalez. Again, the State of Florida sought a writ of certiorari in *Florida v. Franqui (II)*, number 97-1203.

On the basis of *Franqui I* the Florida Supreme Court overturned convictions and sentences of death in *Dennis Escobar v. State*, 699 So.2d 989, 986 (Fla. 1997), and *Douglas Escobar v. State*, 699 So.2d 988, 992 (Fla. 1997). The State of Florida sought writs of certiorari in both of these cases, *Florida v. Douglas Escobar*, number 97-1204; and *Florida v. Dennis Escobar*, number 97-1205. The petitions for writ of certiorari in 97-1202 and 97-1203 where denied on March 23, 1998. The petitions in 97-1204 and 97-1205 are pending, with the clerk's office advising that a decision is likely on April 20, 1998.

In light of the foregoing history of the State of Florida's attempts to seek issuance of a writ of certiorari to the Florida Supreme Court on this issue, Respondent suggests that the matter

has been fully aired and that this fifth petition should be denied.

B. THE RULE ANNOUNCED BY THE FLORIDA SUPREME COURT IN *FRANQUI I* IS A STATE RULE OF EVIDENCE.

In *Franqui v. State (Franqui I)*, 699 So.2d 1312, 1317-19 (Fla. 1997), the Florida Supreme Court looked to United State Supreme Court precedent on the question of whether the non-testifying co-defendant's statements had "sufficient indicia of reliability" to permit their admissibility under the confrontation clause. Having concluded that they did not, the Florida Supreme Court proceeded to a review of statements against penal interest as an exception to the hearsay rule under Fla.Stat.Anno. § 90.804(2)(c). On the strength of Florida law, the Florida Supreme Court decided that this exception to the hearsay rule was not "firmly rooted" sufficient to allow the admission of an out-of-court statement or confession of a non-testifying co-defendant.

In Florida, the "statement-against-penal-interest" exception to the hearsay rule was initially a judicially recognized rule, *Baker v. State*, 336 So.2d 364 (Fla. 1996), which was later codified in Fla.Stat.Anno. §90.804(2)(c). This codification contained a limiting provision: "A statement or confession which is offered against the accused in a criminal action, and which is made by a co-defendant or other person implicating both himself and the accused, is not within this exception." This limiting language was deleted in 1990.

After a review of this history, the Court in *Franqui v. State*,

699 So.2d at 1319, concluded: "/T/his exception is not firmly rooted."

A different tradition in another state might lead to an inconsistent conclusion, but the Florida Supreme Court's reliance on its own tradition does not merit writ of certiorari.

CONCLUSION

Based on the foregoing, Respondent respectfully requests this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **RESPONDENT'S BRIEF IN OPPOSITION** and **MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS** was furnished by mail, this 21st day of April 1998, to **RANDALL SUTTON**, Assistant Attorney General, Office of the Attorney General, 444 Brickell Avenue, Suite 950, Miami, Florida 33131.

WILLIAM M. NORRIS, ESQUIRE